Freeman Decorating Company and Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631, affiliated with International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 28-RC-5688

March 31, 2000

DECISION AND DIRECTION

By Chairman Truesdale and Members Fox and Hurtgen

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge and an objection to an election held on December 9, 1998, and the hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 2 for and 1 against the Petitioner, with 1 challenged ballot.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's recommendations only to the extent consistent with this Decision and Direction.

The hearing officer determined that LeRoy Maestas was a supervisor within the meaning of Section 2(11) of the Act and therefore recommended that the challenge to his ballot be sustained.² The hearing officer found Maestas to be a supervisor in view of his finding that Maestas exercised independent judgment in the approval and disapproval of work schedule changes, and that he granted time off and disciplined employees, including denying temporary employees further work opportunities. The Employer excepts to the hearing officer's finding that Maestas is a supervisor within the meaning of Section 2(11). For the reasons set forth below, we find, contrary to the hearing officer and our dissenting colleague, that the evidence is insufficient to establish supervisory status.

The Employer provides commercial decorating services to conventions and trade shows. The Employer's carpet department is responsible for cleaning carpet, cutting padding, applying logos to carpet, and storing, tagging, and coding carpet for future use. The Employer's operations manager is Robert Haynes. The Employer's warehouse manager is Jeffrey Cuda. His office is located approximately 100 feet from the carpet department. Cuda carries a radio to communicate with each of the Employer's departments, including Maestas in the carpet department. Maestas is the most senior employee in the

carpet department. There are three other employees in the carpet department: Alejandro Incera, Amado Incera, and Billy McClain. In addition, the carpet department has three employees from a temporary agency.³

The daily work of carpet cleaning, pad cutting, and logo designing in the department is routine, and does not vary from day-to-day. Cuda determines the work schedules and work priority in the carpet department. Maestas determines the makeup of work crews and keeps daily timecards for each employee. Cuda is responsible for hiring carpet employees based on Haynes' approval. Cuda also performs yearly evaluations of the carpet employees based on his personal observation of the employees. Maestas has no input on these evaluations.

The hearing officer found that Maestas has no authority to hire, assign or responsibly direct, discharge, evaluate, promote, or grant overtime to employees in the carpet department. The hearing officer further concluded that Cuda and Haynes have defined most of the duties carried out by Maestas. Noting that Maestas possesses a great deal of skill, experience, and knowledge of the department and its operation, the hearing officer also concluded that his daily work of directing carpet cleaning, pad cutting, and logo designing is routine and does not require the exercise of independent judgment by Maestas. The hearing officer, however, credited Alejandro Incera's testimony that Maestas authorized his work schedule change from swing shift to day shift and Amado Incera's testimony that Maestas changed his work schedule to accommodate Maestas' bus schedule. The hearing officer also found that Maestas has the authority to discipline employees by orally reprimanding them and by sending them home and has invoked that authority by orally reprimanding Amado and sending temporary employees home without consulting with Cuda or Havnes.4

It is well settled that the burden of proving supervisory status rests on the party asserting that such status exists. *Ohio Masonic Home*, 295 NLRB 373 (1989). Thus, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). In making determinations regarding supervisory status under Section 2(11) of the Act, "the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied employee rights protected under the Act." *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Accord:

¹ At the hearing, the Petitioner, without objection from the Employer, offered a motion to withdraw its Objection 2, and the hearing officer granted that motion.

² In view of his recommendation to sustain the Petitioner's challenge to Maestas' ballot and issue a Certification of Representative, the hearing officer found it unnecessary to pass on the Petitioner's Objection 1, alleging that the Employer included the name of a supervisor, Maestas, on the eligibility list.

³ The employees from the temporary employment agency are excluded from the unit.

⁴ The hearing officer also credited testimony that Haynes told carpet department employees that Maestas was the man in charge of that department. However, as the hearing officer noted, such statements do not confer supervisory status. *High Performance Tube, Inc.*, 251 NLRB 1362, 1367 (1980).

McDonald Douglas Corp v. NLRB, 655 F.2d 932 (9th Cir. 1981).

The hearing officer credited the testimony of Alejandro and Amado Incera that Maestas routinely approved or disapproved work schedule changes and time off. We find, however, that this testimony falls short of meeting the Petitioner's burden of establishing that Maestas exercised statutory supervisory authority with regard to schedule changes and granting time off. Alejandro testified that, at the time he was hired, he told Cuda that he could not work a straight day shift because of his school schedule and that he could work some days on the day shift and some days on the swing shift.⁵ According to Alejandro, "the deal was, some days morning and some days swing." At the time Alejandro was hired, Cuda told him to speak with Maestas about his schedule. Although Alejandro did not specifically testify that Cuda accommodated his class schedule, it is undisputed that Cuda hired Alejandro with the understanding that Alejandro could only work certain hours because of school. Once Alejandro was hired, Maestas has continued to adapt his work schedule to fit his class schedule.

When the swing shift was eliminated in August 1998, Amado Incera was transferred to the day shift, which started at 6:30 a.m. According to Amado's credited testimony, he asked Maestas if he could come in at 8:30 a.m. rather than the 6:30 a.m. starting time for that shift. Amado testified that Maestas denied this request, stating that he (Maestas) would miss his bus. Contrary to the hearing officer, we do not find that this testimony establishes that Maestas altered Amado's work schedule to accommodate Maestas' bus schedule. Amado's change in work schedule resulted from the decision to eliminate the swing shift. It is undisputed that Cuda determines the starting time of the day shift and Maestas' statement to Amado that Amado had to start work at 6:30 a.m. like everyone else on the day shift does not establish Maestas' authority to change a shift starting time.

The hearing officer also credited the testimony of Alejandro and Amado regarding Maestas' authority to grant time off. Although credited, we find this testimony is insufficient to establish the exercise of statutory supervisory authority. Alejandro testified that, when taking a previously scheduled day off, he tells Maestas and Maestas notes it down on his timesheet.⁶ Maestas maintains daily time records on all permanent and temporary employees, reconciles their hours of work to job/work orders, and electronically transmits this information to the payroll department. While Amado testified that Maestas either approves or disapproves a request for time off "on

the spot," Amado admitted that, during the time he had been employed, he had never requested an unscheduled day off from Maestas.⁷ Further, we find that the hearing officer's reliance on Amado's testimony that Maestas granted him time off to meet with his attorney on January 4, 1999, the day before the hearing in this matter, is misplaced. As a general rule, the Board does not determine voter eligibility based on evidence of events that occurred after the election. *Georgia-Pacific Corp.*, 201 NLRB 831, 832 (1973).

With regard to Maestas' authority to discipline employees, the hearing officer credited Amado's testimony that Maestas verbally disciplined him and threatened to send him home for taking too long in the bathroom. According to Amado, he was gone for approximately 10 minutes and on his return Maestas asked him, "What's the delay here? You're not getting paid to go to the bathroom." Amado also testified that Maestas added that he would send Amado home. Amado also testified, however, that he was not sent home and continued his work without incident. Contrary to the hearing officer, we do not view this exchange as evidence of 2(11) authority to either effectively recommend or impose discipline. To be sure, Amado's credited testimony establishes that Maestas threatened him with discipline. Amado concedes, however, that the threat was never carried out. Further, even assuming that Maestas possesses the authority to verbally reprimand employees, there is no evidence as to what effect, if any, such verbal discipline has on an employee's job status. As the hearing officer found, Maestas does not participate in evaluations of employees. Accordingly, we find that Amado's testimony does not establish the existence of authority to discipline employees.

The hearing officer also relies on the testimony of Aleiandro and Amado that Maestas disciplined nonunit temporary employees by sending them home. According to Amado's testimony, Maestas "sent home" one employee who "was standing around doing nothing. He didn't want to do the job." Amado and Alejandro also testified that Maestas "sent home" another employee who reported to work drunk for the second time. The record does not establish, however, that Maestas' decision to return these two temporary employees to the employment agency required the use of independent judgement. See Loffland Bros. Co., 243 NLRB 74, 75 fn. 4 (1979); Southern Industries Co., 92 NLRB 998, 999 (1950). Accordingly, we do not find that Maestas' action in sending home nonunit temporary employees who were either drunk or insubordinate in refusing a work assignment is sufficient to establish statutory supervisory authority.

⁵ The day or morning shift starts at 6:30 a.m. and the swing shift, which was in operation from October 1997 until August 1998, ran from 2:30 until 11 p.m.

⁶ Alejandro testified that the Employer provides 5 days' paid medical leave each year, and that he usually tells Maestas in advance. Occasionally, Alejandro simply calls in and Maestas notes it.

⁷ Amado testified that, during the 6 months he had been employed, he had asked for one unscheduled day off. Since Maestas was on vacation at that time, Amado spoke with Jim Ness, the Employer's general manager.

We find that the evidence fails to establish that Maestas is a statutory supervisor and we therefore overrule the challenge to his ballot. We shall remand this proceeding to the Regional Director to open and count the ballot of LeRoy Maestas and for further appropriate action.

Since we find that Maestas is not a supervisor within the meaning of the Act, his name was properly included on the eligibility list. Accordingly, we overrule the Petitioner's Objection 1.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 28 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of LeRoy Maestas. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I agree with the hearing officer that challenged voter LeRoy Maestas is a 2(11) supervisor and is thus ineligible to vote in the election. Accordingly, I would sustain the challenge to his ballot and certify the Union as the exclusive collectivebargaining representative.

The hearing officer found, and I agree, that Maestas is a supervisor based on his authority to approve or disapprove work schedule changes, grant time off, and discipline employees, and his authority to deny temporary employees further work opportunities.

With regard to Maestas' authority to change work schedules, credited witnesses Alejandro Incera (Alejandro) and Amado Incera (Amado) both testified that Maestas changed their work schedules without consulting other management authorities. Alejando's schedule was at first set by Maestas to accommodate Alejandro's school schedule. The schedule was later changed at Alejandro's request. Maestas also has the authority to refuse to grant employee requests regarding work schedules. When Amado's swing shift was eliminated and he was

transferred to the day shift, he asked to start his workday at 8:30 a.m. rather than the regular 6:30 time. Maestas, acting alone, refused the request. Clearly, Maestas acted at his own discretion in doing so. Indeed, his reason for doing so was that a change would have interfered with Maestas' own bus schedule.

Amado and Alejandro also testified that Maestas has the authority to approve or disapprove their requests for time off, without consultation with other management officials. The majority again gives little weight to this evidence because Amado testified that, when he requested an unscheduled *day* off, the request was made to another of Respondent's officials in Maestas' absence. The majority also discounts this testimony because Amado's *latest* request for time off was after the election. Neither of these incidents detracts from the credited evidence that Maestas granted time off before the election without consulting other management officials.

Amado and Alejandro credibly testified concerning Maestas' reprimand of Amado for taking an extended bathroom break, and his threat to send him home for that reason. In addition, they testified that Maestas had sent two temporary employees home for disciplinary reasons, and had told at least one that his services were no longer wanted. One of these employees would not perform an assigned task, and another had come to work drunk the day before he was sent home. The majority downplays this evidence because Maestas did not in fact send Amado home. The majority also concludes that Maestas' decisions did not involve the use of independent judgement. I do not agree. There is no indication that failure to perform an assigned task, or coming to work drunk, necessarily and automatically results in the specific discipline of sending the offender home. In sum, discretion is required, and Maestas exercised it. I would therefore agree with the hearing officer that this evidence shows that Maestas had the authority on his own to discipline employees.

Based on the credited evidence presented, I agree with the hearing officer that Maestas is a supervisor.

¹ When Alejandro was hired, he was told by a management official to speak with Maestas about his work schedule.